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Courts -- Jury -- Exclusion of Women from the Jury List

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One aspect of the case offers a field for future litigation, and demands an investigation of the North Carolina Constitution[22] and of pertinent state statutes.[23] The principal case holds that the state cannot exclude individuals, because of their faith or lack of it, from receiving the benefits of public welfare legislation.[24] Some of the court's language indicates it will consider legislation to transport school children as public welfare legislation.[25] Yet the court declares that it does not mean to intimate that a state cannot provide transportation only to children attending public schools.[26] It is possible that this question will be left to the state's discretion and if the state does transport private school children no one can be heard to complain. Nor can anyone complain if transportation is not furnished. However, if a state provides transportation for public school children, as is done in many states, the legislature having determined that expenditures therefor fill a public need, it is at least doubtful, under the present holding, whether the state may discriminate against children attending non-profit private schools, without encroaching upon the equal privileges guaranteed to all under the Fourteenth Amendment.

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Courts—Jury—Exclusion of Women from the Jury List

In *Ballard v. United States*,[1] a mother and son were convicted in the Federal District Court in the Southern District of California for

to the state educational system, then it logically follows that . . . their [the children's] transportation to and from such schools could be paid. . . ." Cochrane v. Louisiana State Bd. of Ed., 281 U. S. 370, 372 (1930).

[22] N. C. CONST. Art. IX, §1: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. IX, §4: "The proceeds . . . shall be faithfully appropriated for establishing and maintaining in this state a system of free public schools, and for no other uses and purposes whatsoever." Art. IX, §11: "The General Assembly is hereby empowered to enact that every child . . . shall attend the public schools . . . unless educated by other means."

[23] N. C. GEN. STAT. (1943) §115-302: "Every parent, guardian or other person in the state having charge or control of a child between the ages of seven and sixteen, shall cause such child to attend school. . . . The term 'school' as used in this section is defined to embrace all public schools and such private schools as have tutors or teachers and curricula that are approved by the superintendent of public instruction or the State Board of Education." §115-374: "The control and management of all facilities for the transportation of public school children shall be vested in the State of North Carolina under the direction and supervision of the State Board of Education. . . . The tax levying authorities in the various counties of the state are authorized and empowered to provide in the capital outlay budget adequate buildings and equipment for the storage of all school busses. . . . The use of school busses shall be limited to the transportation of children to and from school for the regularly organized school day."

[24] Everson v. Ewing Township, —— U. S. ——, 67 Sup. Ct. 504, 512, 91 L. ed. (Adv. Ops.) 472, 480 (1947).

[25] —— U. S. ——, 67 Sup. Ct. 504, 513, 91 L. ed. (Adv. Ops.) 472, 481.

[26] —— U. S. ——, 67 Sup. Ct. 504, 513, 91 L. ed. (Adv. Ops.) 472, 481. —— U. S. ——, 67 Sup. Ct. 504, 512, 91 L. ed. (Adv. Ops.) 472, 480.

[1] —— U. S. ——, 67 Sup. Ct. 261, 91 L. ed. (Adv. Ops.) 195 (1946).

promoting a fraudulent religious organization through the use of the mails. The defendants moved to quash the indictment and also challenged the array of petit jurors on the ground that women, who are eligible for jury duty in California,[2] had been "intentionally and sytematically" excluded from the panel. Both motions were denied. The United States Supreme Court in reversing the Circuit Court of Appeals, which had affirmed the rulings of the trial court; *held,* the indictment must be dismissed because the "purposeful and systematic" exclusion of women from the panel was a departure from the scheme of jury selection which Congress had adopted.[3]

Generally, the qualifications and exemptions of federal jurors are to be determined by the laws of the state in which the federal court is located.[4] Congress has specifically provided that citizens will not be disqualified as grand and petit jurors in any court of the United States because of race, color, previous conditions of servitude[5] or party affiliation.[6] But there is no federal statute which guarantees women a right to serve on a federal jury. Neither the Fourteenth[7] nor the Nineteenth Amendment[8] to the Constitution of the United States requires the states to place women on jury lists. On the other hand, the Sixth Amend-

[2] CAL. CODE OF CIVIL PROCEDURE (Deering, 1941) §198.

[3] A five to four decision. This case had previously been before the Supreme Court of the United States on a different issue. Ballard v. United States, 322 U. S. 78 (1944).

The result in the instant case is not surprising in view of the dictum in *Glasser v. United States,* 315 U. S 60 (1941). The court in that decision strongly indicated that it would have held the jury illegally constituted had there not been such a short time since the state law making women eligible for jury duty had come into force. United States v. Roemig, 52 F. Supp. 857 (N. D. Iowa 1943) followed the dictum in *Glasser v. United States* and sustained a motion to quash an indictment because women, although eligible for jury duty in Iowa, had been systematically excluded from the jury. In Thiel v. Southern Pac. Co., —— U. S. ——, 66 Sup. Ct. 984, 90 L. ed. (Adv. Ops.) 922 (1946) petitioner's motion to strike out the jury panel because "day laborers" had been excluded was denied by the district court and this ruling was affirmed by the circuit court of appeals but the Supreme Court of the United States reversed this ruling and granted a new trial.

[4] JUDICIAL CODE §276 (1917), 28 U. S. C. A. §412. Both grand and petit jurors are selected by the clerk of the court and a jury commissioner from the lists of eligible voters as determined by state law. JUDICIAL CODE §277 (1911), 28 U. S. C. A. §413.

[5] JUDICIAL CODE §278 (1911), 28 U. S. C. A. §415.

[6] JUDICIAL CODE §276 (1917), 28 U. S. C. A. §412.

[7] U. S. v. Roemig, 52 F. Supp. 857 (N. D. Iowa 1943); *see* Strauder v. West Virginia, 100 U. S. 303, 310 (1880). Miller, *The Woman Juror* (1922) 2 ORE. L. REV. 30, 32.

It is a violation of the Fourteenth Amendment of the Constitution of the United States for states to exclude Negroes from jury lists because of race, color or previous condition of servitude. Hill v. Texas, 316 U. S. 400 (1941); Carter v. Texas, 177 U. S. 442 (1900). Excluding members of the Catholic faith from a grand jury was held to be a violation of the Fourteenth Amendment. Juarez v. State, 102 Tex. Crim. Rep. 297, 277 S. W. 1091 (1925).

[8] United States v. Ballard, 35 F. Supp. 105 (S. D. Calif. 1940); Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Powers v. State, 172 Ga. 1, 157 S. E. 195 (1931); Browning v. State, 120 Ohio St. 62, 165 N. E. 566 (1929); State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858 (1944).

ment[9] does not prevent the states from making women liable for jury duty. Therefore, each state is free to determine whether women are eligible jurors or not.[10] The majority of the states either permit or require women to serve on juries, while sixteen states have not placed this public duty on women.[11]

After a state has determined by law those qualified to serve as jurors,[12] the federal courts will decide whether the selection of federal juries from the names of those qualified is proper.[13] Even though no constitutional issue is at stake, the United States Supreme Court may exercise its power of supervision of justice in the federal courts to prevent women from being excluded from federal juries in those states where women are eligible jurors.[14] An indictment by a grand jury or a verdict rendered by a petit jury drawn from a panel in which a qualified class or group has been excluded as such is subject to dismissal without regard to whether the rights of the defendant were prejudiced.[15]

Mr. Justice Douglas speaking for the majority in *Ballard v. United States* stated:

> "The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group . . . or an economic class . . . deprives the jury system of the broad basis it was designed by Congress to have in our democratic society."[16]

The United States Supreme Court, however, has recognized that complete representation of all eligible groups on every federal jury would be impossible and, consequently, no such standard is required.[17] Neither is it objectionable for a state to exempt by law particular groups because

[9] United States v. Wood, 299 U. S. 123 (1936), *rehearing denied*, 299 U. S. 624; Tynam v. United States, 297 Fed. 177 (C. C. A. 9th, 1923), *certeriori denied*, 266 U. S. 604 (1924). The Sixth Amendment provides in part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ."

[10] Ballard v. United States, —— U. S. ——, 67 Sup. Ct. 261, 91 L. ed. (Adv. Ops.) 195 (1946). A state law creating an unlawful qualification is not binding in the selection of federal jurors. Thiel v. Southern Pac. Co., —— U. S. ——, 66 Sup. Ct. 984, 90 L. ed. (Adv. Ops.) 922 (1946).

[11] (1947) 33 A. B. A. J. 113, 114, Alabama, Florida, Georgia, Maryland, Massachusetts, Mississippi, New Hampshire, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia and Wyoming.

[12] The majority rule is that where the primary qualification of a juror is that he be an elector, the conferring upon women of the right of suffrage also makes them eligible as jurors. Note (1945) 157 A. L. R. 461, 472.

[13] Ballard v. United States, —— U. S. ——, 67 Sup. Ct. 261, 91 L. ed. (Adv. Ops.) 195 (1946); Thiel v. Southern Pac. Co., —— U. S. ——, 66 Sup. Ct. 984, 90 L. ed. (Adv. Ops.) 922 (1946).

[14] *Ibid.*

[15] *Ibid.*

[16] —— U. S. ——, 67 Sup. Ct. 261, 265, 91 L. ed. (Adv. Ops.) 195, 199 (1946).

[17] Thiel v. Southern Pac. Co., —— U. S. ——, 66 Sup. Ct. 984, 90 L. ed. (Adv. Ops.) 922 (1946).

of competing public interests.[18] Federal courts have no authority to interfere with state courts which permit women as an eligible group to be systematically and intentionally excluded from the jury lists but it is likely that the strict policy pursued by the federal courts will have a wholesome influence on state courts.[19]

What effect will the decision in *Ballard v. United States* have on the federal courts in North Carolina? In 1944 the Supreme Court of North Carolina in *State v. Emery*[20] held that under Article I, §13 of the state constitution women in this state were ineligible to serve on the jury. This decision was nullified in 1946 by the adoption of a constitutional amendment.[21] Article I, §§13 and 19 were changed to read as follows:

Sec. 13. Right of jury. No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful *persons* in open court. . . .

Sec. 19. Controversies at law respecting property. In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable. *No person shall be excluded from jury service on account of sex.*[22]

What effect do these changes in the North Carolina Constitution have on the eligibility of women to serve as jurors? (1) The substitution of "persons" for "men" in Article I, §13 removes the objection upon which the decision in *State v. Emery* was based. But it does not follow that this change alone would require that women be included on jury lists. (2) The effect of adding the provision "No person shall be excluded from jury service on account of sex" to Article I, §19 is to make women, otherwise eligible, subject to jury duty on an equal basis with men. (3) Neither of these sections, as amended, is self-executing. Legislation[23] is necessary to impose jury duty on women in criminal

[18] Rawlins v. Georgia, 201 U. S. 638 (1906). (1947) Session N. C. General Assembly, H. B. No. 87 which amended N. C. GEN. STAT. (1943) §9-19 and exempted practicing attorneys at law from jury duty.

[19] In 1941 a committee appointed by Chief Justice Stone recommended passage of a federal law establishing uniform national standards for selection of jurors in all federal courts. It was also recommended that women be eligible for federal jury duty in all states. (1947) 33 A. B. A. J. 113.

[20] 224 N. C. 581, 31 S. E. (2d) 858, 157 A. L. R. 441 (1944), noted in 23 N. C. L. REV. 152. The trial jury consisted of ten men and two women. The regular panel had been exhausted and the two women were selected as tales jurors. The defendant, convicted of violating the prohibition laws, was granted a new trial.

[21] The word "persons" was substituted for "men" in Art. I, §§1, 7, 11, 13, and 26 and in Art. VI, §1. The provision "No person shall be excluded from jury service on account of sex" was added to Art. I, §19. This amendment was certified to the Secretary of State by the Governor December 10, 1946 and became effective on that date. (1945) Session Laws of N. C., Chapter 634, §5.

[22] N. C. CONST., Art. I, §§13 and 19. Italics supplied.

[23] The Attorney General said that this constitutional amendment making women subject to jury duty only established the principle and that it did not provide the

cases. Inasmuch as G. S. 9-1 has been apparently interpreted to be inapplicable to women[24] it would seem that this section would have to be amended to comply with the constitutional mandate that "No person shall be excluded from jury service on account of sex." Recent legislation has been acted to accomplish each of these purposes.[25]

G. S. 9-1 was amended in 1947 to require county commissioners to select the names of persons of sufficient intelligence and good moral character to serve on grand and petit juries not only from the tax lists but also from a list of names of persons who do not appear upon the tax lists who are residents of the county and over twenty-one years of age. The clerk of the board of county commissioners or jury commission, in making the list to lay before the board or commission, may secure lists of persons from sources of information deemed reliable. The only groups excluded are those who have been adjudged to be *non compos mentis* and those who have been convicted of any crime involving moral turpitude.[26]

The intent of the General Assembly to give women an equal opportunity with men to serve on juries[27] appears to be manifested in several 1947 statutory provisions which supersede the common-law rule in

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detailed laws necessary to put the principle into courtroom practice. News and Observer (Raleigh, N. C.), March 23, 1947. Art. VI, §6 of the ARIZ. CONST. provides "A trial by jury shall be drawn and summoned from the body of the county. . . ." This provision was construed by the court not to be self-executing. Subsequent legislation limiting jury service to men was ruled to be valid in *McDaniels v. State*, —— Ariz. ——, 158 P. (2d) 151 (1945). In 1945 the legislature of Arizona changed its policy and jury service for women is now optional by statute. ARIZ. CODE (1939) (Cum. Pocket Supp. 1945), §37-102.

[24] N. C. GEN. STAT. (1943) §9-1 prior to 1947 amendments provided that the county commissioners shall select jury lists from the "names of all such persons as have paid all the taxes assessed against them for the preceding year. . . ." But Chief Justice Stacy speaking for the majority in *State v. Emery* rejected the proposal that this provision was intended to apply to women. In the course of his opinion he said: "It were better that the controlling voice should speak again before adopting the interpretation which would impose the obligation of jury service on all women, otherwise qualified, under the provisions of this ancient statute. Obviously, we should think some exemptions would want to be provided, and other changes made." State v. Emery, 224 N. C. 581, 587, 31 S. E. (2d) 858, 863, 157 A. L. R. 441, 449 (1944).

[25] (1947) Session of N. C. General Assembly, S. B. No. 5; H. B. No. 87.

[26] (1947) Session of N. C. General Assembly, H. B. No. 87. Prior to passage of this bill, N. C. GEN. STAT. (1943) §9-1 provided that the jury lists would be taken from persons who had paid their taxes during the preceding year. N. C. GEN. STAT. (1943) §9-16 provided, in part, that it shall not be a valid cause of challenge that a juror called from those whose names are drawn from the box is not a freeholder, or has not paid the taxes assessed against him during the preceding two years. The 1947 legislation considerably increased the number of persons eligible for jury duty by in effect including all persons over twenty-one whether taxpayers or not. Persons engaged in certain specified occupations are exempt from jury service by law. N. C. GEN. STAT. (1943) §9-19 as amended in 1947.

[27] The following was printed on the ballot submitted to the voters November 5, 1946:

☐ For Amendment making Constitution equally applicable to men and women..

☐ Against amendments making the Constitution applicable to men and women.

this state that juries are not to be separated.[28] Judges of the superior court are now authorized, in their discretion, to permit separation of the jury in any criminal case.[29] Moreover, superior court judges are authorized to permit members of the jury of opposite sexes to be provided separate rooming accommodations when not actually engaged in deliberations as jurors and pending the bringing in of a verdict.[30]

The 1947 legislation provides that registered and practical nurses in active practice are exempt from jury duty.[31] When any woman is summoned to serve on any regular or tales jury, she or her husband may appear before the clerk of the superior court and certify that she desires to be excused from jury service for one of the following causes: (1) that she is ill and unable to serve; (2) that she is required to care for her children [who may be] under twelve years of age; (3) that some member of her family is ill and requires her presence and attention; whereupon the clerk in his discretion may excuse her from jury service and so notify the judge of the superior court upon convening the court.[32]

These changes in the North Carolina jury laws have removed certain practical objections to women serving on juries, and have placed them on an equal status with men as eligible jurors. Although the provisions for excusing women from jury duty are liberal, there is nothing in any of these statutes which expressly or impliedly authorizes county commissioners intentionally and systematically to exclude women from the jury lists.

Under the present practice of the federal courts, it is clear that after the effective date of these statutes[33] which confer upon women the

[28] State v. McKenzie, 166 N. C. 290, 81 S. E. 301 (1914); State v. Perry, 44 N. C. 330 (1853); State v. Tilghman, 33 N. C. 513 (1850); State v. Miller, 18 N. C. 500 (1836). In criminal cases, particularly capital offenses, the common law rule against separation of juries has been more rigidly enforced than in civil cases. Separation in a capital case does not as a matter of law vitiate the verdict and the judge is permitted to determine if the jurors were influenced by one outside the jury.

Burns v. Laundry, 204 N. C. 145, 167 S. E. 573 (1933). The jury was allowed to separate for four days but a new trial was granted because the minds of the jurors were not refreshed on the charge when the trial was resumed.

Lerch v. McKinne, 187 N. C. 419, 122 S. E. 9 (1924); Lumber Co. v. Lumber Co., 187 N. C. 417, 121 S. E. 755 (1924). The jury after rendering a verdict and separating were allowed to reassemble on their own request and correct a clerical error in their verdict in the absence of any showing that the jurors had been influenced by outsiders.

[29] (1947) Session of N. C. General Assembly, H. B. No. 87 which amends N. C. GEN. STAT. (1943) §9-17.

S. B. No. 5 which amends N. C. GEN. STAT. (1943) §11-11 no longer requires the jury officer to take an oath to keep the jury together.

[30] *Ibid.*

[31] *Ibid.* Amends N. C. GEN. STAT. (1943) §9-19.

[32] *Ibid.*

[33] N. C. GEN. STAT. (1943) §9-1 as amended in 1947 requires boards of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, to prepare jury lists and every two years thereafter.

civic duty to service on juries, a defendant in a federal court in this state can successfully move to quash an indictment or challenge an array if it can be shown that women were systematically and purposefully excluded from the grand or petit jury, and it will not be necessary that he show that his rights were thereby prejudiced. However, it is not certain that a defendant in a state court will be equally successful. Will he have to show that the exclusion of women was prejudicial to his rights? The Supreme Court of North Carolina has frequently held that statutes which prescribe the manner of selecting jury lists are for the most part "directory" only and in the absence of prejudice, fraud or bad faith on the part of local officials,[34] have refused to sustain a motion to quash the indictment or to sustain a challenge to the array. These cases, however, are not necessarily indicative of the attitude the highest court in this state will take when the question of intentional and systematic exclusion of women from the jury lists comes before it: (1) Generally, these cases are concerned with those irregularities resulting from a deviation from the mechanical processes prescribed by statute for the selection of names for the jury lists;[35] (2) the systematic exclusion of approximately half of those eligible for jury duty is a more serious question. For instance, suppose all men are excluded from the jury lists and only women are subject to be drawn for jury duty in a particular county; (3) repeated instances in which the names of only men appear on jury lists are more likely to be the result of "bad faith" on the part of selecting officials than mere chance;[36] (4) the provision in Article I, §19 of the Constitution that "No person shall be

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The same applies to counties which have jury commissioners or other legally constituted body charged by law with the duty of drawing names of persons for jury service.

The Attorney General of North Carolina advised that the best means to test the legality of women jurors was to select women as tales jurors now. Moreover, it would give women an opportunity to serve before jury lists were prepared in June, 1947. News and Observer (Raleigh, N. C.), March 23, 1947. N. C. GEN. STAT. (1943) §9-11 requires that tales jurors be freeholders.

[34] State v. Mallard, 184 N. C. 667, 114 S. E. 17 (1922); Lanier v. Town of Greenville, 174 N. C. 311, 93 S. E. 850 (1917); State v. Paramore, 146 N. C. 604, 60 S. E. 502 (1908); State v. Banner, 149 N. C. 519, 63 S. E. 84 (1908); Moore v. Guano Co., 130 N. C. 229, 41 S. E. 293 (1902); State v. Perry, 122 N. C. 1018, 29 S. E. 384 (1898); State v. Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231 (1892). Note (1934) 92 A. L. R. 1109. Irregularity in drawing names for a jury panel as ground of complaint by defendant in criminal prosecution.

[35] 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (3d ed. by Frank E. Horack, Jr. 1943) 122. Although the statutes regulating the selection of juries evince an intent to place great safeguards around their selection, minor irregularities, in the absence of fraud and where no injury is shown, are usually construed to be substantial compliance with the statutes and reversible error is thereby avoided.

[36] A distinction must be kept in mind between exclusion from a jury list and not being drawn for jury duty from the list. No doubt, there will be many legitimate juries on which there are no women; and, conceivably, there will be juries on which there are no men. People v. Manuel, 41 Cal. App. 153, 182 Pac. 306 (1919), (women convicted of forgery by an all woman jury).

excluded from jury duty on account of sex" should operate to make statutes passed pursuant thereto mandatory rather than "directory."[37]

Although some state courts require the defendant to show that his rights were prejudiced,[38] the opposing view and the one adopted by the Supreme Court of the United States appears to be the better one. It is logical to conclude that, in a state where trial by jury for the most part[39] has meant trial by a jury of men only, one who has been tried by a jury composed of eligible men received a "fair trial" even though women eligible for jury duty had been intentionally excluded from the jury lists. Nevertheless, the more important consideration is whether or not there has been an intentional violation of the state laws by local officials in the selection of jurors. It is submitted that, when it is shown in a North Carolina court that women were intentionally and systematically excluded from the jury list, defendant's motion to quash the indictment or challenge the array should be sustained.[40]

WILLIAM B. AYCOCK.

Insurance—Fidelity Bonds—Renewals as Affecting the Liability of Surety

On July 10, 1929, the plaintiff indemnity company issued to the defendant bank its fidelity bond covering any loss, not exceeding $10,000, which defendant might sustain as a result of the defalcations of its cashier "while in any position in the continuous employ of the employer after 12 noon 15 July 1929 but before the employer shall become aware of any default on the part of the employee and discovered before the expiration of three years from the termination of such employment or cancellation of this bond, whichever may first happen." The bond could

[37] Art. I, §13 of the N. C. CONST. which states "No person shall be convicted of any crime but by unanimous verdict of a jury . . ." has been construed to guarantee to every person whether a citizen of this state or not a trial by jury (except in petty misdemeanors). State v. Cutshall, 110 N. C. 538, 544, 15 S. E. 261, 262 (1892).

[38] People v. Parman, 14 Cal. (2d) 17, 92 P. (2d) 387 (1939); State v. James, 96 N. J. L. 132, 114 A. 553 (1921). *Contra:* Walter v. State, 208 Ind. 231, 195 N. E. 268 (1935). Noted (1935-36) 11 IND. L. J. 386.

[39] Mr. Justice Devin dissenting in *State v. Emery* stated: "In some counties [in North Carolina] the names of qualified women are included in the jury lists. So that if we should hold now that women were qualified to serve on the jury, it would effect no change, but would only give added authority to a practice already grown up." 224 N. C. 581, 591, 31 S. E. (2d) 858, 865 (1944).

[40] It is questionable if mandamus by a voter to require the county commissioners to prepare a jury list without excluding women will lie inasmuch as N. C. GEN. STAT. (1943) §9-1, as amended in 1947, gives the commissioners a certain amount of discretion in selecting the jury list from the names of those eligible to serve. Board of Education of Alamance County v. Board of Com'rs of Alamance County, 178 N. C. 305, 100 S. E. 698 (1919); Dula v. Board of Graded School Trustees of Lenoir, 177 N. C. 426, 99 S. E. 193 (1919); State *ex rel.* Passer v. County Bd., 171 Minn. 177, 213 N. W. 545, 52 A. L. R. 916 (1927) (specifically denying mandamus when women were excluded). *Contra:* Davis v. Arthur, 139 Ga. 74, 76 S. E. 676 (1912) (a religious group had been excluded).